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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

A. T. GORDON, ET AL.,
Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF AMICUS CURIAE ON BEHALF OF THE MISSOURI STATE TEACHERS ASSOCIATION IN SUPPORT OF POSITION OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Missouri State Teachers Association appears as *amicus curiae* and files this brief accompanied by the written consent of all parties. The Association is a professional association composed of over 49,000 certified persons employed in the Missouri public schools. The members of the Association comprise over 90 percent of the certified employees of school districts in Missouri.

The interest of the Missouri State Teachers Association in this case can be simply stated. The Association is one of the plaintiffs in a case involving legal questions substantially identical to those involved here. The case, *Morgan et al.* v. *The School District of Kansas City, Missouri, et al.*, No. 17688-1, was filed in the United States District Court for the Western District of Missouri, Western Division, and contested the constitutionality of Section 26(b) of Article 6 and Sections 11(b) and 11(c) of Article 10 of the Missouri Constitution of 1945 and the implementing Missouri statutes. These provisions require that school bond issues and certain school tax levies be approved by vote of two-thirds of the qualified electors voting thereon. The *Morgan* case was consolidated with another case involving the same issues (*Brenner et al.* v. *The School District of Kansas City, Missouri, et al.*, No. 17660-1). On August 14, 1970, a three-judge court handed down an opinion and order denying the relief requested by plaintiffs. The Missouri State Teachers Association and a number of the other plaintiffs in that case are presently perfecting an appeal to this Court.

It is clear that the requirement of an extraordinary majority for approval of school bond issues and school tax levies has made it possible for a minority of the electorate in many instances to effectively destroy the desire of the majority for an adequately financed school system. This has occurred numerous times within the last few years in Missouri and has greatly handicapped the school districts in Missouri, creating one financial crisis after another. The Missouri State Teachers Association believes the requirements for extraordinary majority approval found in the West Virginia Statutes and Constitution, as well as Missouri's, violate the Equal Protection Clause of the Four-

teenth Amendment and the Association urges this Court to affirm the opinion of the Supreme Court of Appeals of the State of West Virginia.

ARGUMENT

I.

The three-fifths vote requirement of Article X, Section 8, of the Constitution of West Virginia and of Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the 60 percent vote requirement of Article X, Section 1, of the Constitution of West Virginia and of Section 16 of Article 8, Chapter 11, Code, 1931, as amended, result in a dilution of the votes of that class of voters who cast their votes for a proposition as compared with the votes of those who voted against it.

Petitioners argue that in this case there has been no "weighting" or "dilution" of any voter's vote as compared with the vote of any other voter (Petitioners' Brief, page 8). The irrefutable fact is, however, that the 60 percent requirement results in each negative vote being given one and one-half times the force of an affirmative vote. It is conceded by Petitioners that "The right of equal participation in the election process is now established as a fundamental right." (Petitioners' Brief, page 8). The Petitioners then argue that this right does not include the right to win an election merely because one receives the most votes, citing the case of *Fortson* v. *Morris*, 385 U.S. 231 (1966). However, Petitioners overlook the fact that the majority in the *Fortson* case did not consider it to be a voting rights case. In Georgia if no candidate for Governor received a majority of the votes cast, the legislature then selected the Governor from among the two candidates who received the most votes. This the majority ruled was simply the use of an alternative method to select the Gov-

ernor and it did not dilute or debase the vote of any voter as compared with any other voter.

Such a situation does not exist in the case at bar. Here a single issue was submitted to the electorate and each voter was faced only with the choice of casting his vote either affirmatively or negatively. Since the result of the election was to be based on a comparison of the number of affirmative votes with the number of negative votes, any system which allows the side receiving a minority of votes to win the election inevitably results in a dilution of value of the votes of those voters who voted with the majority as compared with the votes of those who voted with the minority. Thus in elections conducted in the manner of the ones presently before the Court, the side obtaining the majority of votes must be declared the winner, not because of the political theory of majority rule but because the Equal Protection Clause of the Fourteenth Amendment requires "equality of voting power" among qualified voters. *Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

Petitioners argue that the West Virginia Constitutional and statutory provisions in question do not result in class legislation. The argument is apparently based on the fact that individual members of the class cannot be determined prior to the election. In the case of *Westbrook* v. *Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970), decided by the California Supreme Court En Banc, this type of argument was met by pointing out that the statute they were considering created two classes of voters: those who favored and those who opposed bond issues. The court observed:

> "It is not essential that a classification appear in explicit terms on the face of the law. Nor is it neces-

sary that those who are allegedly disadvantaged by the classification either constitute a class which is 'objectively identifiable' prior to the election or that they share in common other characteristics, such as race, economic status or residence. It is sufficient that the class emerge from its inchoate state at the time of the election and that it be defined by the act of voting affirmatively on a bond issue proposition. The equal protection clause extends to the shared political interests of groups otherwise random and diverse." 87 Cal. Rptr. at 850.

The fact that a person who votes in the affirmative on one question may vote in the negative on the next and that the class may change from issue to issue is irrelevant. The voter is classified each time he votes and if he chooses to vote yes the value of his vote is diluted.

II.

The three-fifths vote requirement of Article X, Section 8, of the Constitution of West Virginia and of Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the 60 percent vote requirement of Article X, Section 1, of the Constitution of West Virginia and Section 16, of Article 8, Chapter 11, Code, 1931, as amended, are not necessary to promote a compelling state interest.

Once it has been determined that the constitutional and statutory provisions in question have diluted the weight of some citizens' votes, they violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States unless they are necessary to promote a compelling state interest. In the case of *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), this Court pointed out that since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of that right must be subjected to careful and meticulous

scrutiny to determine whether such infringement was *necessary* to promote a *compelling* state interest. The test is a two-fold one, as is pointed out in footnote 14 to the Court's opinion in *Kramer*. This Court stated:

> "Of course, if the exclusions are necessary to promote the *articulated* state interest, we must then determine whether the interest promoted by limiting the franchise constitutes a *compelling* state interest." [Emphasis added.] 395 U.S. at 632.

In the case now before the Court, the Petitioners argue that the interest promoted is the prevention of burdensome indebtedness and excessive taxation. While it cannot be denied that a 60 percent requirement makes it more difficult to pass bond issues and tax levies than would the requirement of a simple majority, there is no logical reason to believe that 60 percent of the voters will act wisely after assuming that a mere majority will not.

The West Virginia Supreme Court of Appeals highlighted the fallacy of this argument when it pointed out:

> "We are unwilling to concede that a determination of issues such as those involved in this case cannot be safely entrusted to a majority of the voters." *Lance* v. *Board of Education of County of Roane*, 170 S.E.2d 783, 791 (W.Va. 1969).

A similar comment was made by the Supreme Court of California in the case of *Westbrook* v. *Mihaly*, *supra*, when it observed:

> "We consider it fanciful to argue, in the absence of any evidence, that a majority of this electorate, better educated and with access to far more sources of information than its counterpart of a century ago, is so incapable of mature judgment that it will bankrupt itself through indiscriminate borrowing." 87 Cal. Rptr. at 856, 857.

Such an argument becomes even less defensible when one considers that the true effect of these provisions is to place the finances of the West Virginia school system under the control of a minority. As Alexander Hamilton pointed out in "The Federalist" No. 22:

> ". . . To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser . . . . The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater . . . ."

Further, an alternative and constitutionally permissible means of securing the alleged state interest would involve the placing of absolute limitations on bond issues and tax levies. In fact, limitations of this nature now exist in West Virginia. Article X, Section 8, of the West Virginia Constitution limits the amount of indebtedness which may be incurred by a county, city, school district or municipal corporation. Article X, Section 1, not only limits the maximum rate which may be passed by a tax levy election, but also limits the period of time for which such an increase may continue. Since an alternate constitutional means of promoting the state interest is available, it cannot be shown that the extraordinary majority requirement is *necessary*.

Petitioners have made no effort to demonstrate that the state, county and statutory provisions in question are *necessary* to promote a compelling state interest. If conditions ever existed which would have justified such a requirement, they do not today. The California Supreme

Court presented a well-documented analysis in the case of *Westbrook* v. *Mihaly, supra,* which clearly shows that changed conditions in local government administration and in the bond market now provide safeguards against fiscal irresponsibility by local governments. This analysis is found in subpart A of Section III of the opinion.

Financial stability is, of course, an important state interest, but the only *compelling* state interest in this case is the maintenance of a decent school system. As then Chief Justice Warren said in *Brown* v. *Board of Education,* 347 U.S. 483 (1954):

> "Today, education is perhaps the most important function of state and local governments." 347 U.S. at 493.

III.

The three-fifths vote requirement of Article X, Section 8, of the Constitution of West Virginia and of Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the 60 percent requirement of Article X, Section 1, of the Constitution of West Virginia and of Section 16, of Article 8, Chapter 11, Code, 1931, as amended, constitute per se violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Even if the extraordinary majority requirements were found to be necessary to promote a compelling state interest, they would still constitute a per se violation of the Equal Protection Clause of the Fourteenth Amendment. An analysis of this Court's opinions involving voting rights reveals that the cases generally fall into three categories. The first category involves cases where states or their subdivisions have attempted to deny certain persons the right to vote. These include the cases of *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Kramer* v. *Union Free School District, supra,* and *Cipriano* v. *City of Houma,* 395 U.S. 701

(1969), and may generally be characterized as involving the setting of qualifications for voters. It has usually been conceded that reasonable requirements as to age, citizenship, residence and literacy, are valid.

The second category involves cases where the votes of qualified voters have been diluted by the effect of a state or its subdivisions' apportionment of geographic constituencies. These include the cases of *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Avery* v. *Midland County*, 390 U.S. 474 (1968); and *Hadley* v. *Junior College District, supra.* In these cases the court has rejected, as insufficient, all alleged state interests which would result in deviation from the concept of one man, one vote. The only deviation tolerated is that made necessary because it is admittedly not practicable to require exact mathematical equality in districts.

The third category involves cases where the vote of qualified voters within a single constituency is diluted by a state's constitutional or statutory provisions. This category is similar to the second in that it involves the dilution of the vote of certain qualified voters, but it differs from the second in that the weighting of votes occurs within a single constituency rather than between two different constituencies. *Gray* v. *Sanders*, 372 U.S. 368 (1963), is the only case in this category decided by this Court. However, the case at bar also clearly fits into this category. In these cases there is no problem involving the securing of exact mathematical precision. As Justice Stewart pointed out in his concurring opinion in *Gray*:

> "This case does not involve the validity of a State's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present. We do not deal here with the 'basic ground

rules implementing *Baker* v. *Carr*.' This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote." 372 U.S. at 381, 382.

The tests set out in *Kramer* v. *Union Free School District, supra,* need not be applied to the case at bar, for, as the Court stated in *Gray*:

"Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." 372 U.S. at 379, 380.

In *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), the court held Virginia's poll tax unconstitutional. The court said:

"But we must remember that the interests of the State, when it comes to voting, is *limited* to the power to fix qualifications." [Emphasis added.] 383 U.S. at 668.

This Court, in the footnote to its opinion in the *Reynolds* case, quoted from Justice Douglas' dissent in *MacDougall* v. *Green,* 335 U.S. 281 (1948) (*Moore* v. *Ogilvie,* 394 U.S. 814 (1969), overruled the majority opinion in *MacDougall*), as follows:

" 'None would deny that a state law giving some citizens twice the vote of other citizens in either the

> primary or general election would lack that equality which the Fourteenth Amendment guarantees * * * The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.'" 377 U.S. at 564

Yet what Justice Douglas referred to is exactly what has happened in the case at bar. Here, those voters who chose to cast their votes in the negative had those votes weighted one and one-half times the vote of those who voted in the affirmative. In deciding the case of *Hadley v. Junior College District, supra,* the court set out the principle which should be controlling here:

> "But once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' Gray v. Sanders, 372 U.S. 368, 381 (1963)." 397 U.S. at 59.

The constitutional and statutory provisions here involved are designed to allow a minority to consistently frustrate the will of the majority. For this reason they violate the Equal Protection Clause of the Fourteenth Amendment.

IV.

Lower Federal and State Court opinions which have considered the constitutionality of extraordinary majority requirements.

In addition to the Supreme Court of Appeals of the State of West Virginia's decision in this case, there have been three other reported decisions which have considered the constitutionality of extraordinary majority requirements similar to the ones here involved. The Supreme

Court of California in *Westbrook* v. *Mihaly, supra,* struck down the two-thirds majority requirement for the passage of certain bond issues and tax levies.

In *Bogert* v. *Kinzer,* 465 P.2d 639 (1970), the Idaho Supreme Court reached the opposite result and upheld a provision of the State's Constitution requiring a two-thirds majority for the issuance of general obligation bonds.

In *Rimarcik* v. *Johansen,* 310 F. Supp. 61 (D. Minn. 1970), a three-judge Federal Court struck down as violative of the Equal Protection Clause, a Minnesota statute requiring 55 percent voter approval to adopt or amend a city charter provision governing liquor control laws.

In the *Bogert* case, the Idaho Supreme Court based its decision on the fact that the United States Constitution contains provisions requiring the approval of more than a simple majority vote in deciding certain questions. The Federal analogy argument has been examined and rejected by this Court. *Gray* v. *Sanders, supra, Reynolds* v. *Sims, supra.* In the *Reynolds* case, the rejection of the Federal analogy was based upon the fact that the United States Constitution was developed through a series of compromises among sovereign states, and it was therefore not relevant as a guide for what is required to comply with limitations placed on the individual states.

In the case of *Morgan et al.* v. *The School District of Kansas City, Missouri, et al., supra,* in which the Missouri State Teachers Association is a party, the three-judge court's opinion has not yet been published. The court in *Morgan* reached a decision directly opposite to that of the California Supreme Court in the *Westbrook* case and which was contrary to the rationale of the three-judge court in *Rimarcik.*

CONCLUSION

It is respectfully submitted that the three-fifths vote requirement of Article X, Section 8, of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and the 60 percent vote requirement of Article X, Section 1, of the Constitution of West Virginia and of Section 16 of Article 8, Chapter 11, Code, 1931, as amended, are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. They are therefore unconstitutional, unenforceable and void. The opinion of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

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